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## *NOGHREY v. TOWN OF BROOKHAVEN:* HOW FAR IS "TOO FAR" IN A REGULATORY TAKINGS CASE

John D Echeverria and Michael E. Kenneally, Jr.

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### Introduction

The landmark case of *Pennsylvania Coal Co v. Mahon*,<sup>1</sup> Oliver Wendell Holmes famously observed that a regulation goes "too far" represents a "taking" under the Takings Clause to the U.S. Constitution. In the 85 years since that decision, courts and commentators have struggled to define how far is too far. The recent decision by the Appellate Division, Second

Department in the case of *Noghrey v. Town of Brookhaven*,<sup>2</sup> provides some useful guidance on this important question.

The Appellate Division reversed a takings award totaling \$7.5 million (with accumulated interest), on the ground that the trial court had improperly instructed the jury on how to evaluate whether a zoning amendment goes too far. The trial court instructed the jury that it could find a taking under the Fifth Amendment if it determined that the Town's zoning amendment imposed a "significant" or "substantial" economic burden. The appellate court ruled this charge was "insufficient to convey the proper standard by which to evaluate the economic impact of the rezoning for the purpose of determining whether, under federal law, there was a taking." The Court held that to show the kind of economic impact that will support a takings finding, the evidence must demonstrate that the owner of the property was left with no more than a "bare residue" of value.

### II. Overview of Regulatory Takings Doctrine

While academic commentators often decry the conceptual challenges of takings law, the U.S. Supreme Court has succeeded over the last 20 years in articulating a relatively clear set of standards that yield reasonably predictable results in Fifth Amendment takings cases.

#### A. Direct Appropriations and Invasions

Based on text and history, the Takings Clause clearly applies to outright appropriations and physical occupations of private

<sup>1</sup> 260 U.S. 393 (1922).

<sup>2</sup> 852 N.Y.S.2d 220 (2d Dept. 2008).

property. Thus, the government must pay compensation for a taking when it seizes property to construct a public road or, as in the famous *Kelo*<sup>3</sup> case, to promote economic development. Similarly, the government must pay compensation when it physically occupies property, such as by flooding it or allowing the public to use it as a public park.

The Supreme Court has said that direct appropriations and occupations represent *per se* (or automatic) takings, without regard to the numerous factors that come into play in regulatory takings analysis.<sup>4</sup> In particular, a physical taking will be compensable even if it affects only a small portion of the property.<sup>5</sup> By contrast, under the so-called "property as a whole" rule applicable in regulatory takings cases, the impact of a regulation must be evaluated by looking not at the portion of the property affected by the regulation, but at the claimant's entire landholding.

## B. Regulatory Takings

In comparison to physical occupations and appropriations, application of the Takings Clause to regulations rests on more uncertain footing. William Michael Treanor, Dean of the Fordham Law School, has written: "The original understanding of the Takings Clause was clear on two points. The clause required compensation when the federal government physically took private property, but not when government regulations limited the ways in which property could be used."<sup>6</sup> Despite the framers' original intent, the Supreme Court has long held that certain regulatory restrictions can be so burdensome that they should be treated as takings as well. But here, too, classic takings remain the touchstone: as the Supreme Court has emphasized, the issue in a regulatory takings case is whether the restriction is so burdensome that it is the "functional equivalent" of an appropriation or a physical occupation.<sup>7</sup>

More specifically, the Supreme Court has identified two species of regulatory takings. First, under *Lucas v. South Carolina Coastal Council*,<sup>8</sup> a regulation will generally be held to be a taking when it renders property completely valueless. Second, if the burden imposed by a regulation stops one step short of complete obliteration of the property value, the regulation still may result in a taking under the so-called *Penn Central* analysis.<sup>9</sup> The *Penn Central* decision calls for a relatively complex analysis focusing on (1) the economic impact of the

regulation, (2) the reasonableness of the owner's investment-backed expectations, and (3) the character of the regulation.

A special takings test applies to regulatory exactions—conditions attached to a regulatory permit requiring the permittee to grant the public permanent physical access to the property. An exaction effects a taking if (1) there is an absence of an "essential nexus" between the government's regulatory goals and the exaction,<sup>10</sup> or (2) the burden imposed by the exaction is not "roughly proportional" to the projected impacts of the proposed development.<sup>11</sup>

Finally, for many years the U.S. Supreme Court said that a property owner could establish a taking by demonstrating that a regulation failed to "substantially advance" a legitimate government interest. However, in *Lingle v. Chevron USA, Inc.*,<sup>12</sup> the Supreme Court repudiated this ostensible takings test, ruling that it had no place in regulatory takings law. Instead, the Court ruled that this type of means-ends allegation raises a claim under the Due Process Clause that must be evaluated using the Court's traditional, deferential rational basis standard.

## III. The *Noghrey* Case

### A. Background

The *Noghrey* case arose from the efforts by the Town of Brookhaven, on the eastern end of Long Island, to control strip development along its major roadways. In the 1980s, Brookhaven found itself in the path of a development boom. Between 1959 and 1989, the Town's population had increased from 90,000 to more than 400,000 persons. By 1989, Brookhaven was the fastest growing town on Long Island.

The Town's zoning regulations, and in particular those governing commercial development, were inadequate to deal with this intense development pressure. Virtually all of the property along the major east-west roadways in the town was zoned for commercial use, far more than was needed to meet projected demand. This zoning threatened to produce an unattractive and inefficient development pattern with one strip center after another.

In response to this problem, the Town engaged in a comprehensive review of its zoning regulations. Based on expert planning advice and substantial public input, the Town

<sup>3</sup> *Kelo v. City of New London*, 546 U.S. 807 (2005).

<sup>4</sup> See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

<sup>5</sup> *Id.*

<sup>6</sup> William Michael Treanor, "The Original Understanding of the Takings Clause and the Political Process," 95 Col. L. Rev. 782 (1995).

<sup>7</sup> *Lingle v. Chevron U.S.A., Inc.*, 543 U.S. 924 (2004).

<sup>8</sup> 505 U.S. 1003 (1992).

<sup>9</sup> *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

<sup>10</sup> *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

<sup>11</sup> *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

<sup>12</sup> 543 U.S. 924 (2004).

developed a proposal designed to channel future commercial development into identifiable, walkable clusters. Brookhaven ultimately rezoned more than 250 properties and over 1,200 acres from a commercial to a residential designation. The revised zoning plan is designed to ensure that future development in Brookhaven will produce less traffic congestion, less environmental degradation, and a more livable and attractive community.

The plaintiff, Paviz Noghrey, an experienced developer, owned two of the properties affected by the rezoning. Mr. Noghrey acquired the properties in 1985 with the intention of building shopping plazas. At the time of the purchases, the properties were zoned for commercial uses, including the proposed shopping plazas. As a result of the rezoning, only residential uses were allowed.

Mr. Noghrey commenced a lawsuit in Supreme Court, Suffolk County alleging a taking of his private property rights. After trial, a jury found that he had established a regulatory taking under the U.S. Constitution based on the *Penn Central* analysis.

## B. Decision on Appeal

The sole issue on appeal was whether the Supreme Court had properly instructed the jury on the level of economic impact sufficient to support a claim under *Penn Central*. While the plaintiff had asserted a total taking claim under *Lucas*, the jury had rejected that claim. There was no reasonable basis in the record for asserting that the zoning change had rendered the property valueless. Thus, the only issue was whether the jury, armed with proper instructions, could have properly concluded that the regulations were sufficiently burdensome to amount to a taking under *Penn Central*.

The jury charge read, in relevant part: "With respect to the first factor; that is, the economic impact of the regulation, [the plaintiff] claims that the values of his properties were reduced substantially. You may consider the values of the properties immediately before and immediately after the rezoning, and whether or not this reduction in value was a substantial reduction relative to the value before the properties were rezoned. [The plaintiff] must prove by a preponderance of the evidence that the rezoning deprived him of any use permitted by the residential zoning classification and this resulted in . . . a near total or substantial decrease or significant reduction in value [emphasis added]." <sup>13</sup>

The Appellate Division held that this charge was incorrect as a matter of law. The Court observed that the Supreme Court has stated that a *Penn Central* taking requires a diminution in value that is "one step short of complete" <sup>14</sup> and referred to lower federal court cases that rejected *Penn Central* claims "where the diminution in value caused by a regulation approached or exceeded 90% of the pre-regulation value." <sup>15</sup>

Accordingly, the Appellate Division held that the instructions were inadequate because the terms "substantial" and "significant" were insufficient to convey "the extent of diminution necessary to support a taking." <sup>16</sup> The matter needed to be retried, the Court said, and the jury should be instructed that "the economic impact factor of the *Penn Central* analysis requires a loss in value which is 'one step short of complete,' and that a land use restriction 'is not rendered unconstitutional merely because it causes the property's value to be 'substantially reduced.'" <sup>17</sup> The Court concluded that the court on retrial "should instruct the jury that the proper inquiry is whether the regulation left only a 'bare residue' of value, or use similar language which would properly convey to the jury the high threshold of loss necessary to support a partial regulatory taking." <sup>18</sup>

## IV. Conclusion

The Supreme Court has repeatedly reaffirmed the primacy of *Penn Central* analysis in takings cases, in one case describing *Penn Central* as the "polestar" of takings law. <sup>19</sup> Nonetheless, the multi-factor, *ad hoc* character of *Penn Central* analysis has caused some uncertainty about the limits of regulatory takings doctrine. The *Noghrey* decision is a useful point of reference because it provides specific guidance on what type of proof is insufficient—and what type of proof may be sufficient—to support a regulatory takings claim under *Penn Central*. While the controversy surrounding takings cases is unlikely to abate any time soon, *Noghrey* helps further clarify takings doctrine.

While the Appellate Division reversed the jury verdict in favor of the plaintiff, it did not enter a judgment for the Town of Brookhaven, but instead remitted the case for retrial in accordance with the Court's ruling. It appears unlikely, based on the evidence introduced so far, that the plaintiff will be able to demonstrate the kind of severe economic loss necessary to show a taking under *Penn Central*. Moreover, the jury also must consider the reasonableness of the plaintiff's investment expectations, that is, to what extent an experienced developer

<sup>13</sup> *Noghrey*, 852 N.Y.S.2d at 221.

<sup>14</sup> *Id.*, citing *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1019 n. 8.

<sup>15</sup> *Noghrey*, 852 N.Y.S.2d at 222, citing *Rith Energy v. United States*, 270 F.3d 1347 (2001); *Pompa Constr. Corp. v. City of Saratoga Springs*, 706 F.2d 418 (2d Cir. 1983).

<sup>16</sup> *Noghrey*, 852 N.Y.S.2d at 222.

<sup>17</sup> *Id.* at 222, quoting *Putnam County Natl. Bank v. City of New York*, 829 N.Y.S.2d 661, 663 (2d Dept. 2007), quoting *de St. Aubin v. Flacke*, 505 N.Y.S.2d 859, 885 (1986).

<sup>18</sup> *Id.*

<sup>19</sup> *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 326 n.23 (2002), quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring).

would expect zoning to remain unchanged indefinitely. The jury also must consider the character of the regulation, including the fact that this zoning change represents a fairly conventional police power regulation, developed through a thoughtful community planning process, and applied in comprehensive fashion across the community. Stay tuned.

*John D. Echeverria is the Executive Director of the Georgetown Environmental Law & Policy Institute at Georgetown University Law Center. Michael E. Kenneally, Jr. is Associate Counsel for the Association of Towns for the State of New York. Messrs. Echeverria and Kenneally filed a friend of the court brief with the Appellate Division in the Noghrey case on behalf of the Association of Towns for the State of New York, the American Planning Association, and the New York Metro Chapter of the American Planning Association.*

## LEGAL DEVELOPMENTS

### AIR QUALITY

#### Vetoed Legislation

On September 25, 2008, New York Governor David Paterson vetoed legislation that would have established a state development program to promote new technologies and processes to avoid, abate, mitigation, capture or sequester CO<sub>2</sub> and other greenhouse gases. In his veto memorandum, Governor Paterson stated that while he supported the intent of the legislation, he vetoed the bill because it should be considered in the budget process when the State projects revenue and considers initiatives in a variety of areas. (Governor's Veto Memo 142).

### ASBESTOS

#### Federal District Court Upheld Bankruptcy Court's Approval of Settlement Agreements Arising From Asbestos Claims

In March 2006, a company and forty of its subsidiary companies filed for bankruptcy. The company had been sued by 133,000 plaintiffs for its role in manufacturing automotive gaskets containing asbestos products. In November 2007, a federal bankruptcy judge issued an order approving four settlement agreements between the company and 7,500 of the claimants for approximately \$2 million total, or an average of \$267 per claim. Five claimants appealed the order, alleging that the court erred in approving the settlements because they were not filed as part of the public record of jointly administered bankruptcy cases and that, as a result, the claimants did not receive sufficient notice of the contents of the settlements. The company argued that the orders were sealed unopposed and that the claimants never moved to unseal them, thus the appeal was improper. The court denied the appeal, holding that there were sufficient facts in the public record for the bankruptcy court to

approve the settlement agreements even though they were filed under seal. The court further held that the bankruptcy court did not err in applying the factors to be considered in approving the settlement agreements. *In re Dana Corporation*, 2008 U.S. Dist. LEXIS 71430 (S.D.N.Y. Sept. 22, 2008).

#### Board Properly Determined that Decedent's Death From Pancreatic Cancer Not Related to Asbestos Exposure

A plaintiff was employed as a gas line repairman for Con Ed from 1964 to 1995, during which time he was exposed to asbestos and other chemicals. Shortly before his death in 1995, he was diagnosed with pancreatic cancer, which precipitated a claim for workers' compensation death benefits. After a series of hearings, an administrative law judge rendered a decision finding no causal relationship between the death and his employment. On appeal, the Worker's Compensation Board affirmed. On further appeal to the Appellate Division, it affirmed as well, holding that the decisions were supported by substantial evidence given that Con Ed's medical expert opined that there was no evidence that asbestos caused pancreatic cancer. *Ciafone v. Consolidated Edison*, 54 A.D.3d 1135; 864 N.Y.S.2d 216 (2d Dept. 2008).

### ENERGY

#### Court Denied New York Power Authority's Condemnation Proceeding Regarding Land on Which a Fast Track Power Plant Was Constructed

A company, Steel Los III, that owned a million square feet of property in the Town of Bethpage commenced an action concerning half an acre of its property that had been acquired in 2005 for the development of a fast-track power plant. Adjacent to this property was property owned by a power development company, Calpine. Calpine had constructed a power plant on its property in 2001 and had been approached by the Long Island Power Authority (LIPA) in 2003 to build the fast-track power plant. Accordingly, Calpine approached Steel Los III to see about purchasing the half acre property. In 2004, Steel Los III and Calpine entered into an agreement whereby Calpine would lease the property to build the plant. In order to provide LIPA with assistance in carrying out this project, the New York Power Authority (NYPA) entered into an agreement with LIPA. Calpine subsequently entered into an agreement with NYPA whereby NYPA had access and control to the entire site for purposing of permitting. From the outset, NYPA planned to acquire the site. When Calpine and Steel Los III refused to give up ownership to the site, NYPA sought ownership of it through eminent domain. In an earlier decision, the trial court denied a motion for preliminary injunction on the grounds that it lacked jurisdiction. This decision was reversed by the Appellate Division in October 2006, which held that the court did have jurisdiction to decide the issue because the NYPA had proceeded under of the exemptions under the Eminent Domain Proceeding